

# KEEPING IT LEGAL FEDERAL LANGUAGE ACCESS LAW

---

By Bruce L. Adelson, Esq.

# Keeping it Legal

## Federal Language Access Law

Bruce L. Adelson, Esq, CEO of Federal Compliance Consulting LLC, is nationally recognized for his federal compliance expertise. Bruce is a former U.S Department of Justice Senior Attorney. During his Justice career, Bruce had national enforcement responsibility for many federal laws.

The Chief Judge of the U.S. District Court for the Middle District of Louisiana qualified Bruce in 2014 as an expert in several areas, including civil rights and allegations of discrimination.

Bruce has been the testifying expert in federal and state litigations involving spoken language access, American Sign Language effective communications, and disability access.



# Keeping it Legal

## Federal Language Access Law



Today's Material is the Property of Federal Compliance Consulting LLC & Bruce L. Adelson. All Intellectual Property Rights Retained. Today's Material is Educational and Informational Only. No Recording, Duplication, or Distribution Permitted Without Licensed Consent.

# Keeping it Legal

## Federal Language Access Law



**SO WHAT?**

**WHO CARES?**

# Keeping it Legal

## Federal Language Access Law

“[F]iscal pressures are not a blanket exemption from civil rights requirements.”

“[L]anguage services must be considered part of the cost of doing business.”

United States Department of Justice, March 8, 2012



# Keeping it Legal Federal Language Access Law

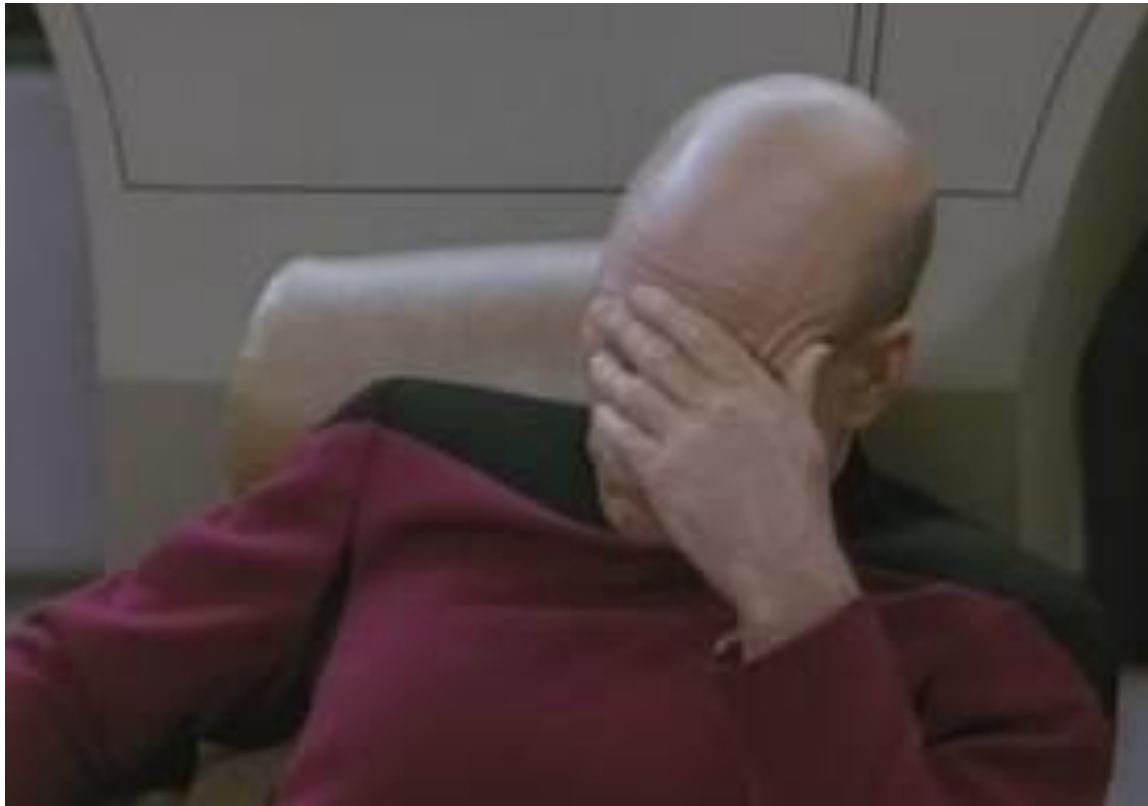
*It's The Law!*



Courtesy: Michael Adelson, CDO

# Keeping it Legal

## Federal Language Access Law



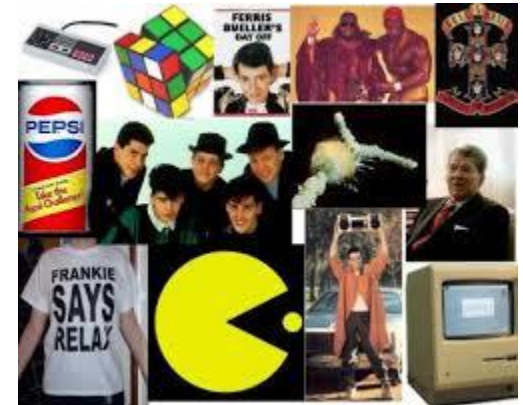
## Keeping it Legal Federal Language Access Law

**"LET ME SHOW YOU HOW WE  
SAVED ONE...HOSPITAL OVER  
\$500,000 ANNUALLY WITH VIDEO  
REMOTE INTERPRETING (VRI)  
WHILE IMPROVING ACCESS AND  
COMPLIANCE."**

# Keeping it Legal

## Federal Language Access Law

Intoxicado case?  
1980s Old News  
Is That ALL?



# Keeping it Legal Federal Language Access Law

## Affordable Care Act 30-Day Readmission Penalties

**More Than \$1,000,000,000 And Counting....**



# Keeping it Legal

## Federal Language Access Law

Section 1557 is the nondiscrimination provision of the Affordable Care Act (ACA). The law prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in health programs and activities that receive federal financial assistance from the federal government or are administered by an Executive agency or any entity established under Title I of the ACA.

Under the proposed rule, Section 1557 also applies to the Health Insurance Marketplace and health programs administered by the Department of Health and Human Services (HHS).

# Keeping it Legal

## Federal Language Access Law

“The key to providing meaningful access for LEP persons is to ensure that the recipient/covered entity and LEP person can communicate effectively.

The steps taken by a covered entity must ensure that the LEP person is given adequate information, is able to understand the services and benefits available, and is able to receive those for which he or she is eligible. The covered entity must also ensure that the LEP person can effectively communicate the relevant circumstances of his or her situation to the service provider.”

HHS-NPRM

# Keeping it Legal

## Federal Language Access Law

“Section 1557 provides Plaintiff with a private right of action to sue...

Thus, Congress likely intended to create a new right and remedy in a new context without altering existing laws.”

Rumble v. Fairview Health Services d/b/a Fairview Southdale Hospital, and Emergency Physicians, P.A.  
(D. Minn., 2015)



# Keeping it Legal

## Federal Language Access Law

### **Title VI of the Civil Rights Act of 1964**

“No Person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

42 United States Code § 2000d

# Keeping it Legal

## Federal Language Access Law

1964 Civil Rights Act – Historic Law



# Keeping it Legal

## Federal Language Access Law

### ASSURANCE/CERTIFICATE OF COMPLIANCE

**ASSURANCE OF COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, SECTION 504 OF THE REHABILITATION ACT OF 1973, TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, AND THE AGE DISCRIMINATION ACT OF 1975**

**The Applicant provides this assurance in consideration of and for the purpose of obtaining Federal grants, loans, contracts, property, discounts or other Federal financial assistance from the U.S. Department of Health and Human Services.**

**THE APPLICANT HEREBY AGREES THAT IT WILL COMPLY WITH:**

**Title VI of the Civil Rights Act of 1964 (Pub. L. 88-352), as amended, and all requirements imposed by or pursuant to the Regulation of the Department of Health and Human Services (45 C.F.R. Part 80),** to the end that, in accordance with Title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant receives Federal financial assistance from the Department.

# Keeping it Legal

## Federal Language Access Law

### Title VI of the Civil Rights Act of 1964

#### **No Discrimination in Federally Subsidized Programs or Activities**

No Discrimination Based on Race, Color, or National Origin

Language-Based Discrimination = National Origin Discrimination

Title VI applies equally if federal aid is \$1 or \$1,000,000,000 – Money from State Can Also Trigger Title VI

Title VI applies to ENTIRE federally subsidized office, hospital, court, agency, police department, school system, etc...

# Keeping it Legal

## Federal Language Access Law

- Title VI and its implementing regulations can be violated by the denial of federally funded program benefits on the basis of English proficiency

Lau v. Nichols, 414 U.S. 563, 568-69 (1974)

- “... longstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI.”

United States of America v. Maricopa County, Arizona (D. AZ, 2012)

- “Longstanding Justice Department regulations also expressly require communication between funding recipients and program beneficiaries in languages other than English to ensure Title VI compliance.”

Nat'l Multi Housing Council v. Jackson, 539 F. Supp. 2d 425, 430 (D.D.C. 2008)

# Keeping it Legal

## Federal Language Access Law

Title VI Requires “Meaningful Access” to Services

- Language Assistance to Limited English Proficient (LEP) People
  - Trained, Assessed Interpreters, Bilingual Staff, Volunteers
    - Translated Vital Documents
- No Children, Friends, Parents, Relatives



# Keeping it Legal

## Federal Language Access Law

### How Do You Provide Language Assistance?

Qualified, Assessed In-Person Interpreters

Qualified, Assessed Bilingual Staff

Qualified Language Services Companies

Assessed Volunteers

Translated Documents

Technology – Telephone, Video Conferencing, Video Remote Interpreting, etc.

**ALL OF THE ABOVE**

# Keeping it Legal

## Federal Language Access Law

### Federal Enforcement Activity

Recent Federal Enforcement Agreement w/Large Hospital:



“The training program shall be of sufficient content and duration to cover the following....

The impact of ethnic and cultural differences on effective communication and the need for sensitivity to diversity issues...”

One of 17 required training topics, mandated for hospital by US HHS

## Keeping it Legal Federal Language Access Law

“We have determined that The City of XXX is not in compliance with Title VI of the Civil Rights Act of 1964 and its implementing regulations. The City of XXX is no longer eligible to receive federal funding. You are also hereby notified that we are initiating a compliance review of your Title VI program to determine whether additional action is warranted.”



# Keeping it Legal

## Federal Language Access Law

### Liability

- Title VI - Plaintiffs Must Prove Intentional Discrimination

### Proof of Title VI Intent

- Provider fails to offer language assistance
- No CLAS Compliance
- Provider offers inadequate assistance
- Provider uses third parties for language assistance
- Hostile comments from staff
- Provider has no LAP Plan
- Provider does not train staff
- Some or all of the above



# Keeping it Legal

## Federal Language Access Law

### **CONSEQUENCES of Non-Compliance**

- Cut-off federal funds
- Billion Plus Dollars in CMS Penalties
- Compliance reviews of organizations investigated for Title VI violations
- Ongoing Federal investigations and oversight

*Civil rights money damages – NOT covered by malpractice insurance*

# Keeping it Legal Federal Language Access Law

## GOTTA HAVE THOSE PLANS



## Keeping it Legal Federal Language Access Law

The repeated use of a racial slur in an isolated incident can create a hostile work environment, the U.S. Court of Appeals for Fourth Circuit decided May 7, 2015

The Fourth Circuit is one of the first courts of appeals to find that a single incident of racially discriminatory language can violate the Civil Rights Act of 1964

AND...

## Keeping it Legal Federal Language Access Law

“Furthermore, the evidence of [Hospital’s] failure to revise its ADA compliance policy, which it admits needs revision, and its lack of training on addressing the needs of the hearing impaired, creates a possible inference that the plaintiffs’ problems with the provision of auxiliary services will continue in the future.”

U.S. Court of Appeals - 2015

# Keeping it Legal

## Federal Language Access Law

“Myriad factors are driving hospitals and care systems to address the nonmedical determinants of population health. Most notably, the Affordable Care Act implicitly and explicitly promotes a population health management approach to care delivery...

[Affordable Care Act] ... compels hospitals to address the socioeconomic, behavioral and environmental factors that affect people before hospital admission and after discharge.”

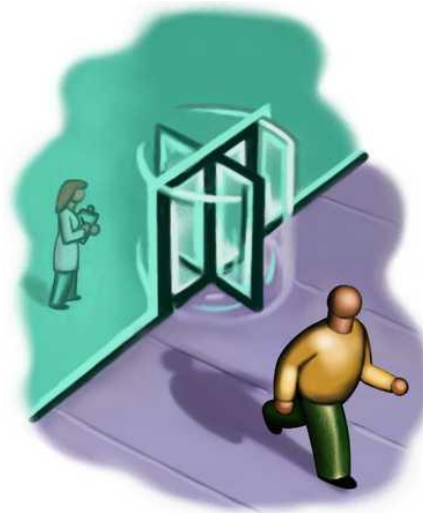


Source: Association for Community Health Improvement. (2013, December). *Trends in hospital-based population health infrastructure: Results from an Association for Community Health Improvement and American Hospital Association survey*. Chicago: Health Research & Educational Trust.

# Keeping it Legal

## Federal Language Access Law

Longer length of hospital stays for LEP patients when professional interpreters not used at admissions and/or discharge.



Source: Improving Patient Safety Systems for Patients With Limited English Proficiency - Agency for Healthcare Research and Quality - U.S. Department of Health and Human Services – September, 2012

© Federal Compliance Consulting LLC and Bruce L. Adelson, 2016 All Rights Reserved Unauthorized use prohibited

# Keeping it Legal

## Federal Language Access Law

Greater risk of surgical delays and readmission due to LEP patients' greater difficulty understanding instructions, including how to prepare for a procedure, manage their condition, and take their medications, as well as which symptoms should prompt a return to care or when to follow up.



© Federal Compliance Consulting LLC and Bruce L. Adelson, 2015 All Rights Reserved Unauthorized use prohibited

Source: Improving Patient Safety Systems for Patients With Limited English Proficiency - Agency for Healthcare Research and Quality - U.S. Department of Health and Human Services – September, 2012

# Keeping it Legal

## Federal Language Access Law

“There are three common causes for medical errors attributed to insufficient patient language assistance:

- Use of family members, friends or non-qualified staff as interpreters;
- Clinicians with basic foreign language skill who try to communicate without using qualified interpreters;
- and

**•Cultural beliefs and traditions that affect health care delivery”**

Healthcare Risk Management Review, June 5, 2014

# Keeping it Legal

## Federal Language Access Law

National Standards for Culturally and Linguistically  
Appropriate Services in Health Care

### CLAS Standards

- Framework for health organizations to best serve diverse communities
- Guidelines and recommendations to inform practices for cultural and linguistic competency in health care



# Keeping it Legal

## Federal Language Access Law

“Standards 4, 5, 6, and 7 are based on Title VI of the Civil Rights Act of 1964 (Title VI) with respect to services for limited English proficient (LEP) individuals. Title VI requires all entities receiving Federal financial assistance, including health care organizations, take steps to ensure that LEP persons have meaningful access to the health services that they provide.”

Courtesy: US HHS, Office of Minority Health, March, 2001



# Keeping it Legal

## Federal Language Access Law

### **Key Points for DOJ**

- Do you have children, friends, or relatives provide language assistance?
  - Do you have Title VI and LAP Plans?
- Do you have MANDATORY leadership and staff Title VI training?
- Do you train and assess interpreters & bilingual staff?
  - Do you restrict language access to certain departments, rooms, buildings?

# Keeping it Legal

## Federal Language Access Law

### Compliance Self-Assessment

- Do you have a Title VI Coordinator?
- Do you have children, friends, or relatives provide language assistance?
- Do you have compliant Title VI complaint and grievance procedures?
  - Do you post notices of non-discrimination in applicable languages?
  - Do you have Title VI and LAP Plans?
  - Do you have mandatory, authoritative Title VI training?
  - Do you have CLAS/Cultural Competence Training?
- Do you decide type of language assistance or does customer?
- Do you train and assess interpreters and staff who speak non-English languages?
- Have you asked customers to bring their own translated documents?
- Have you asked LEP people to come back another day when an interpreter will be available?
- Have you asked an LEP person why he/she does not speak English?
  - Have you provided language assistance without assessment?
  - Have you implemented CLAS?

## Keeping it Legal Federal Language Access Law

Do You Still Discuss WHY you must provide  
language access?

OR



Do You Discuss HOW?

# Keeping it Legal

## Federal Language Access Law Plans

- 1. Assign responsibilities and establish procedures for ensuring compliance with Title VI of the Civil Rights Act of 1964 and related regulations and directives;
- 2. Ensure that people affected by federally subsidized programs/activities receive the services, benefits, and opportunities they are entitled to without regard to race, color, or national origin;
- 3. Prevent Title VI discrimination in federally funded/assisted programs;
- 4. Establish procedures for identifying impacts in any program, service, or activity that may create an illegal adverse impact on any person because of race, color, national origin or on minority populations, low-income populations, all interested persons and affected Title VI populations – SEE: Environmental Justice;

# Keeping it Legal

## Federal Language Access Law

### Plans

- 5. Establish procedures to review Title VI compliance – at least annually;
- 6. Establish and announce procedures for filing and resolving complaints by people believing they have experienced Title VI discrimination;
- 7. Notify affected persons of Title VI protections;
- 8. Implement effective and organization-wide mandatory training; and
- 9. **Establish sub-recipient compliance and monitoring procedures !!!!!!!!!!!!!!!!!!!!!!!!!!!!!**

# Keeping it Legal

## Federal Language Access Law

### Language Access Plan

#### **How do you Provide Language Assistance?**

**The population eligible to be served by race, color and national origin**

How do you determine Language Assistance Methods?

Language Services Providers – Essential Partners

Due Diligence Check – Resources, Internal/External Training,  
Reputation

Four-Factor Analysis

Vital Documents & Translation

# Keeping it Legal

## Federal Language Access Law

### **“CMS Releases First Ever Plan to Address Health Equity in Medicare**

Today, the Centers for Medicare & Medicaid Services (CMS) Office of Minority Health (CMS OMH), unveiled the first CMS plan to address health equity in Medicare. The CMS Equity Plan for Improving Quality in Medicare (*CMS Equity Plan for Medicare*) is an action-oriented plan that focuses on six priority areas and aims to reduce health disparities in four years.”

September 2015

# Keeping it Legal

## Federal Language Access Law

- **“Priority 1:** Expand the Collection, Reporting, and Analysis of Standardized Data
- **Priority 2:** Evaluate Disparities Impacts and Integrate Equity Solutions Across CMS Programs
- **Priority 3:** Develop and Disseminate Promising Approaches to Reduce Health Disparities
- **Priority 4:** Increase the Ability of the Health Care Workforce to Meet the Needs of Vulnerable Populations
- **Priority 5:** Improve Communication and Language Access for Individuals with Limited English Proficiency and Persons with Disabilities
- **Priority 6:** Increase Physical Accessibility of Health Care Facilities”

# Keeping it Legal

## Federal Language Access Law

### **Americans with Disabilities Act of 1990**

“No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”



**42 United States Code §12132**

# Keeping it Legal

## Federal Language Access Law

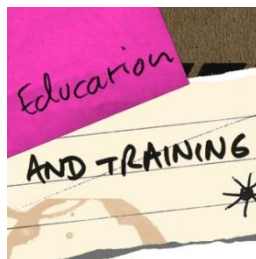
**EFFECTIVE COMMUNICATIONS - January 31, 2014 –  
New USDOJ ADA Guidelines**

Proper Use of VRI  
DOJ's Barrier Free Health Care Enforcement Program –  
Nationwide – Sued Hospitals, Drs' Offices  
Lots of Lawsuits



Keeping it Legal  
Federal Language Access Law

# Mandatory Training and Education



# Keeping it Legal

## Federal Language Access Law

### Words of Wisdom from the U.S. Department of Justice:

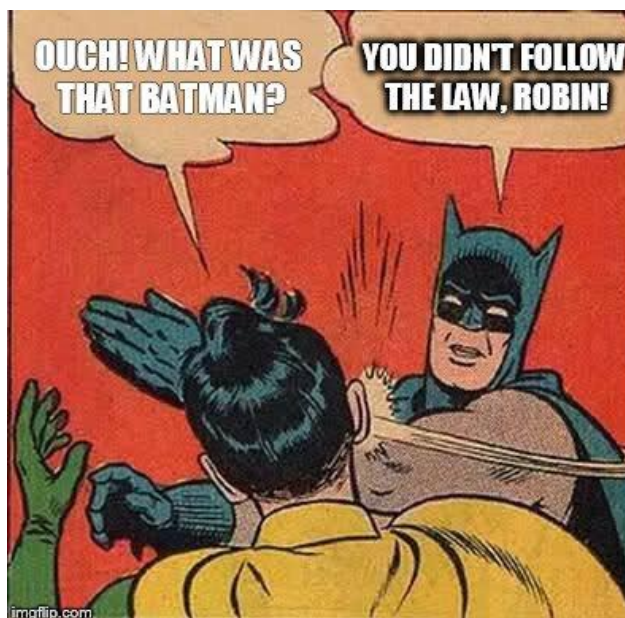
“A critical and often overlooked component of ensuring success is **comprehensive and ongoing staff training**. Covered entities may have established good policies, but if front line staff are not aware of them or do not know how to implement them, problems can arise. Covered entities should teach staff about the ADA’s requirements for communicating effectively with people who have communication disabilities.”

Source: U.S. Department of Justice January 31, 2014 Effective Communication Guidance

# Keeping it Legal

## Federal Language Access Law

**Proper Language Assistance is the LAW!**  
**Disability Access is the LAW!**



Courtesy:  
Michael Adelson, CDO

# Keeping it Legal

## Federal Language Access Law

Bruce L. Adelson, Esq.

Federal Compliance Consulting, LLC

301-762-5272 (direct line)

badelson1@comcast.net

badelsonfcc@verizon.net